

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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**CASE NO. A-6619
PETITION OF GABRIEL AND SARA SOLOMON**

**OPINION OF THE BOARD
(Opinion Adopted June 12, 2019)
(Effective Date of Opinion: June 20, 2019)**

Case No. A-6619 is an application by Petitioners Gabriel and Sara Solomon for several variances necessary to allow the proposed construction of an eight (8) foot fence around the perimeter of their property, as follows:

The proposed construction of an eight (8) foot fence requires a variance of 79.50 feet as it is within 0.50 feet of the front lot line. The required setback is eighty (80) feet, in accordance with Section 59-4.4.6.B.2 of the Zoning Ordinance.

The proposed construction of an eight (8) foot fence requires two variances of 14.50 feet each as the proposed fence is within 0.50 feet of each side lot line. The required setback is fifteen (15) feet, in accordance with Section 59-4.4.6.B.2 of the Zoning Ordinance.

The proposed construction of an eight (8) foot fence requires a variance of 9.50 feet as it is within 0.50 feet of the rear lot line. The required setback is ten (10) feet, in accordance with Section 59-4.4.6.B.2 of the Zoning Ordinance.

The proposed construction of an eight (8) foot fence requires a variance to be located forward of the rear building line. Section 59-4.4.6.B.2 of the Montgomery County Zoning Ordinance requires that accessory structures be located in the rear yard only.

The Board held a hearing on the application on June 12, 2019. Petitioner Gabriel Solomon appeared in support of the requested variances. He was represented by Jody S. Kline, Esquire.

Decision of the Board: Variances **GRANTED**.

EVIDENCE PRESENTED

1. The subject property is Lot P4, Block B, Springbrook Forest Section 1 Subdivision, located at 12020 Kemp Mill Road, Silver Spring, MD, 20902, in the RE-1 Zone. It is a four-

sided lot which the Statement of Justification ("Statement") describes as "relatively square." It has an area of 41,605 square feet. The County owns a 2,888 square foot "sliver" of land that "runs parallel between the property's frontage and improved Kemp Mill Road." See Exhibits 3 and 4(a).

2. The Statement indicates that the subject property abuts other one-acre residential properties on two sides, and is confronted across Kemp Mill Road, to the west, by the 536-acre Wheaton Regional Park, which is described by the Statement as "the dominant geographical feature of the neighborhood." See Exhibit 3. The Site Plan indicates that the Ravenswood Homeowners Association, Inc., owns the property abutting the fourth side of the subject property, to the north. See Exhibit 4(a).

3. The Statement describes Wheaton Regional Park as being part of a larger conduit for wildlife, specifically deer, and indicates that it is because of these deer that the Petitioners are seeking to install the requested fence, as follows:

... much of the parkland [in Wheaton Regional Park] is naturalized and is part of the Sligo Creek stream valley as well as attached to the Northwest Branch Park. Both parks are organized and encouraged to serve as wildlife corridors throughout the southeastern areas of Montgomery County. It is the proximity to the heavy deer population residing in Wheaton Regional Park and its environs, that travel to feed on the Solomons' property, that is stimulating this request for multiple variances.

The Solomons purchased their property in 2008. Unfortunately, since the Solomons moved on to the property, the deer population has only increased both on and around their property. Deer have caused significant tree and plant species destruction. But more importantly to the Solomons, the deer have brought with them ticks bearing Lyme Disease. Both of the Applicants' children have contracted Lyme Disease. Both have been treated and cured but another exposure to the disease could be damaging to their health.

The Statement goes on to state that the Petitioners had tried to remedy the deer problem by installing the flexible, vinyl mesh deer fencing suggested by the County and permitted by the Zoning Ordinance, but that this fabric has been "ineffective," largely because "many branches, and even trees, fall on the loose mesh fence material and crush it to the ground. When that event happens, the Solomons cannot get repair crews to the site fast enough to keep deer from entering the property." See Exhibit 3. The Petitioners provide a photograph showing the "density, size and height of trees" on their property with their submission. See Exhibit 5(b).

4. The Petitioners are seeking to install an eight (8) foot high black vinyl-covered chain link fence around the sides and rear of their property, and a "more attractive, but equally reliable" eight (8) foot high steel picket fence along the frontage of Kemp Mill Road. The Statement indicates that "[t]he black vinyl covered chain link material of the proposed fence is a sturdy material that will prevent deer running through it and will not fall down due to falling branch[es] and other debris." See Exhibits 3 and 5(a). The Statement notes that this request

is "in line with other applications for deer fencing" that the Board has reviewed, such as that of the Audubon Naturalist Society, and that "[a]t its facilities at Brookside Garden and Pope Farm, M-NCPPC has erected 10' high chain link fences on its properties" which have successfully protected the fauna on those properties. See Exhibit 3.

5. The Statement at Exhibit 3 further notes, in explaining why the subject property satisfies the test set forth in Section 59-7.3.2.E.2 of the Zoning Ordinance, that:

This application relates to the installation and maintenance of fences only. Fences on one acre lots in this area of Montgomery County are a common feature. As mentioned above, the majority of the surrounding property is forested. Across the street is the Wheaton Regional Park. To the south, the abutting house is located at an elevation and behind trees [so] that it is not visible from the subject site. The property to the north has a pre-existing chain link fence around its perimeter. The rear of the subject site also abuts the rear yard of the neighbor to the east. Both yards are heavily forested and are already separated by a fence.

6. With respect to the remaining findings in Section 59-7.3.2.E.2 of the Zoning Ordinance, necessary for the grant of a variance, the Statement states that the Petitioners are not responsible for the conditions peculiar to their property, in satisfaction of Section 59-7.3.2.E.2.b, and notes that they are "unable under the current Zoning Ordinance to construct a fence with durable material at a height that will keep deer out of the yard...." With respect to Section 59-7.3.2.E.2.c, the Statement indicates that "[t]he requested fence is the minimum height (8') suggested by the County's zoning ordinance for deer fence, but will be of a sturdier material than otherwise used for deer fencing to prevent damage to the fence." The Statement states that the installation of the proposed fencing will not impair the intent and integrity of the 2001 Kemp Mill Master Plan, in satisfaction of Section 59-7.3.2.E.2.d. Finally, the Statement notes that the grant of the requested variances will not be adverse to the use and enjoyment of neighboring properties, since it will replace an existing fence, but will be slightly taller, and because "[t]he surrounding properties are also so heavily forested that they will not be able to see most of the fence from their property." See Exhibit 3. The record contains letters of support from the owners of three abutting residential properties. See Exhibits 9(a)-(c).

7. At the hearing, counsel for the Petitioners oriented the Board members to the property. Counsel stated that the subject property is approximately one acre in size, and is an extremely heavily wooded parcel of land. He stated that because of the amount of substantial and mature vegetation on the property, the Petitioners are seeking a six-inch (6") leeway in the placement of the proposed fence so that they can go around trees and other vegetation.

Counsel explained that the subject property is located at the northwest corner of the subdivision, and abuts three single-family residential properties and the community open space for a townhouse community. Describing what he described as "basically a deer sanctuary," Counsel stated that the 536-acre Wheaton Regional Park is located directly across Kemp Mill Road from the subject property, and that wrapping around that is Northwest Branch Park, which is over 700 acres and extends all the way to the District of Columbia line.

He stated that the proposed fence will create a more defensible perimeter for the property, and would address this unique situation with minimal impact on the community.

8. Petitioner Gabriel Solomon testified in support of the requested variances. He testified that his property has lots of trees and other vegetation, including plantings and a garden. He testified that he tried installing two feet of deer fencing on top of an existing six foot wall, but that because the deer fencing was more rickety than the fence below it, deer could jump in and knock down the fence, after which other deer would follow and enter the property. The Petitioner testified that the deer jump right over a six-foot fence, stating that there is a hill across the street from his property, and that the deer will run down that hill with a lot of velocity which helps them clear the existing fence. He testified that while trees occasionally fall down, branches are more of a problem, and that during storms, they frequently fall and knock down the deer fencing. He testified that he has had carpenters and fence professionals come to his house to try to solve the fence problems, and that there are no easy answers.

The Petitioner testified that two of his children have been treated for Lyme disease, contracted from tick exposure at their home, and he presented a doctor's letter to that effect. See Exhibit 11. That letter notes that the Solomon's home "is in a heavily wooded area with a large deer population, who are primary carriers of Lyme's infected deer ticks." The Petitioner then explained to the Board why it was important that his children not contract Lyme again.

FINDINGS OF THE BOARD

Based on Petitioner Gabriel Solomon's binding testimony and on the exhibits of record, the Board finds that the requested variances, listed at the outset of this Opinion and necessary for the construction of the proposed fence, can be granted. The requested variances comply with the applicable standards and requirements set forth in Section 59-7.3.2.E of the Montgomery County Zoning Ordinance, as follows:

1. *Section 59-7.3.2.E.2.a - one or more of the following unusual or extraordinary situations or conditions exist:*

Section 59.7.3.2.E.2.a.i exceptional narrowness, shallowness, shape, topographical conditions, or other extraordinary conditions peculiar to a specific property;

The Board finds that the subject property is unique for two reasons which, when taken together, constitute an extraordinary condition specific to this property. First, the subject property is located directly across the street from a regional park that consists of hundreds of acres of largely naturalized parkland, and that abuts an even larger expanse of parkland. Counsel for the Petitioners referred to this as "basically a deer sanctuary," and the Petitioners' Statement indicates that the number of deer, and thus the damage and disease caused by the deer, is only increasing. See Exhibit 3. Second, the Petitioners' property is heavily treed and as a result, per the Statement and the testimony of record, falling branches from the existing trees cause frequent damage to the standard deer fencing that the Petitioners had previously installed, negating its effectiveness. The Board finds that the combined close proximity of the subject property to such an enormous expanse of undeveloped parkland, with its correspondingly large population of deer, and the inability of the Petitioners to effectively

utilize the fencing allowed by the Zoning Ordinance to exclude these deer from their property because of its heavily treed nature, constitutes an unusual or extraordinary situation or condition specific to this property.

2. *Section 59-7.3.2.E.2.b. the special circumstances or conditions are not the result of actions by the applicant;*

The Board finds that the Petitioners, who purchased this property in 2008, are not responsible for the forested nature of the subject property or for its proximity to hundreds of acres of parkland. Thus the Board finds that the Petitioners took no action to create the unusual or extraordinary situation or conditions specific to this property.

3. *Section 59-7.3.2.E.2.c. the requested variance is the minimum necessary to overcome the practical difficulties that full compliance with this Chapter would impose due to the unusual or extraordinary situations or conditions on the property;*

The Board finds, based on the Statement at Exhibit 3, that the requested setback variances are the minimum necessary to allow the construction of the proposed fence to proceed. The Board notes that the Petitioners are seeking an eight (8) foot fence, which is the maximum height of a "deer fence" as defined in Section 59-1.4.2 of the Zoning Ordinance, but that the fence they are proposing will be made of sturdier material in order to overcome the maintenance challenges that the Petitioners have found to exist with standard deer fencing because of the heavily treed nature of their property. Accordingly, the Board finds that the variances requested are the minimum needed to overcome the practical difficulties that full compliance with the Zoning Ordinance would impose due to the unusual or extraordinary situations or conditions specific to the subject property.

4. *Section 59-7.3.2.E.2.d. the variance can be granted without substantial impairment to the intent and integrity of the general plan and the applicable master plan;*

The Board finds, per the Statement, that the installation of the proposed fencing will not impair the intent and integrity of the 2001 Kemp Mill Master Plan. See Exhibit 3.

5. *Section 59-7.3.2.E.2.e. granting the variance will not be adverse to the use and enjoyment of abutting or confronting properties.*

The Board finds, based on the Statement, which indicates that the proposed fence will replace an existing (shorter) fence and that "[t]he surrounding properties are also so heavily forested that they will not be able to see most of the fence from their property," and based on the letters of support from abutting neighbors, that the grant of the requested variances will not be adverse to the use and enjoyment of neighboring properties. See Exhibits 3 and 9(a)-(c).

Accordingly, the requested variances from the required minimum setbacks set out in Section 59-4.4.6.B.2 of the Zoning Ordinance are **granted**, subject to the following conditions:

1. Petitioners shall be bound by the testimony and exhibits of record; and

2. Construction shall be in accordance with Exhibits 4(a)-(b) and 5(a), except as necessary to avoid trees and other significant vegetation.

Therefore, based upon the foregoing, on a motion by Bruce Goldensohn, seconded by John H. Pentecost, Chair, with Stanley B. Boyd, Vice Chair, Katherine Freeman, and Jon W. Cook in agreement, the Board adopted the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above is adopted as the Resolution required by law as its decision on the above-entitled petition.


John H. Pentecost, Chair
Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 20th day of June, 2019.


Barbara Jay
Executive Director

NOTE:

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book. Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County, in accordance with the Maryland Rules of Procedure. It is each party's responsibility to participate in the Circuit Court action to protect their respective interests. In short, as a party you have a right to protect your interests in this matter by participating in the Circuit Court proceedings, and this right is unaffected by any participation by the County.

See Section 59-7.3.2.G.1 of the Zoning Ordinance regarding the twelve (12) month period within which the variance granted by the Board must be exercised.